

## **REMARKS**

Claims 1-42 are pending in the instant application. Claims 29-31 are withdrawn. Claims 1, 9, and 17 have been amended and claims 32-42 have been added. Claims 1, 9, and 17 are independent. Reconsideration of this application, as amended, is respectfully requested.

## **ELECTION/RESTRICTION**

Applicants affirm the election of November 19, 2002 to prosecute the invention of a system for warming a fluid and a cartridge for use therein, claims 1-28, and withdraw the method of warming fluids in a medical application, claims 29-31 (as originally filed), reserving the right to file a divisional application thereon.

## **OVERVIEW OF THE FORD PATENT**

As seen in FIG. 2 Ford teaches that a combination of at least six members comprise the cassette that allegedly anticipates the present invention. In particular, the Ford cassette is comprised of two flexible foil layers, two adhesive layers, a foam spacer, and a frame. The cassette lies horizontally in the warmer. The fluid enters at an angle through the input port on the frame into the foam spacer fixed between the two flexible foil layers and the two adhesive layers.

### **35 U.S.C §102(b) FORD REJECTION**

Claims 1-4, 9-13, 17-20, and 22-25 have been rejected under 35 U.S.C. § 102(b) as being unpatentable in view of U.S. Patent No 5,381,510 to Ford et al., hereafter “Ford”. This rejection, insofar as it pertains to the presently pending claims, is respectfully traverse.

With respect to independent claims 1 and 9, the claimed invention has a cartridge comprising a rigid plate. Applicants respectfully submit that Ford does not anticipate this limitation.

Column 7, lines 1-3 of Ford teach that the spacer 300 is preferably made of foam to compensate for the absence of completely flat surfaces. Column 7, line 65 through column 8, line 12, teach the process of fixing the foam spacer to the heated foils and that the foam spacer is compressed during heating from .125 inches to .090 inches. Accordingly, Ford’s spacer forms and compresses. Applicants respectfully submit that the relied upon spacer in Ford is therefore physically and fundamentally different than the rigid plate of the present invention. For instance, page 8, paragraph 41 of the present invention discloses that the polycarbonate cassette is made of a rigid material. The rigid plate, therefore, does not, and physically cannot, compress like the foam spacer of Ford. By definition, a rigid plate cannot be compressible foam.

Furthermore, the same paragraph discloses that the rigid material effectively conducts heat. Foam, as taught in Ford, does not conduct heat.

With respect to amended independent claim 17, Applicants respectfully submit that the relied upon prior art fails to teach all the claimed limitations of the present

invention. In particular claim 17 teaches an upper and lower housing section that rotatably open. The Ford invention relies on a frame for sliding into an opening at the face of the heating device. The Ford invention does not rotatably open and makes no mention of upper and lower housing sections. Accordingly Ford fails to anticipate the claimed invention.

Applicants respectfully submit that claims 1, 9, and 17 are allowable for at least the reasons set forth above. Applicants further respectfully submit that claims 2-4, 10-13, 18-28, and 32-42 are allowable by virtue of their dependency on independent claims 1, 9, and 17. Reconsideration and withdrawal of the rejection is respectfully requested.

### **35 U.S.C. §103(a) FORD REJECTION**

Claims 5 and 21 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,381,510 to Ford et al. Applicants respectfully traverse this rejection.

In formulating this rejection the Examiner asserts that Ford discloses all the elements of independent claims 1 and 17 with the exception of using “a single membrane to cover both sides of the rigid passageway, and asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to [use a single membrane].

Applicants respectfully submit that Ford teaches away from using a single membrane. Column 7, lines 11-24, teaches that “It is preferable to keep the two flexible, heat conductive foils 200, 400 separate and apart.” Accordingly, Ford clearly teaches

that it would disadvantage the invention to use one single membrane because then the heat conductive foils would not be "separate and apart", as preferred by Ford.

For the aforementioned reasons, Applicants respectfully submit that Ford teaches away from using a single membrane. Applicants respectfully submit that claims 5 and 21 be allowed for at least this reason. Reconsideration and withdrawal of this rejection is respectfully requested.

### **35 U.S.C. §103(a) FORD/PATEL REJECTION**

Dependent claims 6-8, 14-16, and 26-28 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Ford et al. in view of U.S. Patent No. 5,533,992 to Patel et al.

In formulating this rejection the Examiner asserts that Ford discloses everything except for the rigid passageway and the film or membrane being made of a non-DEHP plastic. To overcome this deficiency, the Examiner relies on Patel and asserts that Patel discloses a non-DEHP material for use in medical applications in order to avoid possible carcinogens dissociating from the plastic and entering the fluid. The Examiner concludes that it would have been obvious to one having ordinary skill in the art at the time the invention was made to use non-DEHP plastic for the flow chamber in the device, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

Applicants respectfully submit that claims 6-8, 14-16, and 26-28, be allowed by virtue of their dependency on allowable independent claims 1, 9, and 17.

Reconsideration and withdrawal of the § 103(a) rejection is respectfully requested.

### **OTHER REASONS FOR ALLOWANCE**

Claims 32, 34, and 42 recite a polycarbonate cartridge and a polycarbonate film. Applicants respectfully submit that such a limitation is not suggested or taught by Ford or Patel. Applicants respectfully submit that although Ford discloses an apparatus for heating fluids comprising a cassette means for transferring heat to fluids flowing there through, the heat conductive membrane means is not the same as the claimed polycarbonate film of the present invention. Nor is the foam spacer the same as the polycarbonate rigid frame of the claimed invention.

Column 6, lines 24-32, teaches that Ford considered only foils, i.e., metallic foils. Specifically, Ford teaches that the membrane means of Ford is limited to a thin foil, which may be metallic or other material which is highly thermally conductive...[for providing] a first heat conductive layer 200. Such a layer may be *silver plated copper*...but for parenteral fluids is preferably *stainless steel foil*. Accordingly, the means discussed in the Ford patent are limited to those discussed; *metallic material such as silver, copper, and stainless steel*.

Claim 41 includes the limitation of a transparent film that completely covers the first and second surfaces. It is respectfully asserted that the prior art of record fails to show or teach the use of a transparent film.

The relied upon prior art makes no indication that a transparent film would be an adequate replacement for the Ford invention. As discussed above, Ford taught the use of a foil for covering the foam spacer. An advantage of the transparent film is discussed in the present invention's specification on page 10, first paragraph. "[T]he rigid structure of the cartridge 36 allows the cartridge 36 to be primed first (outside of the warmer 12), with the nurse observing for any air bubbles." As a result, a transparent film allows a visual inspection of the cartridge to assure that the cartridge is free of air bubbles. This advantage was not discussed in Ford, which is indicative that Ford did not consider the use of a transparent film.

Applicants respectfully submit that claims 29, 41, and 42 be allowed by virtue of their dependency on independent claims 1, 9, and 17. Furthermore, Applicants respectfully submit that claims 29, 41, and 42 be allowed for the reasons set forth above.

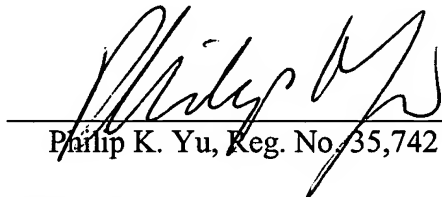
**CONCLUSION**

It is respectfully submitted that the application is now in condition for allowance and a Notice of Allowance is courteously solicited. If any questions remain concerning this application, the Examiner is invited to contact Philip K. Yu at (714) 708-8555 in the Costa Mesa, CA area.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §1.16 or under 37 C.F.R. §1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

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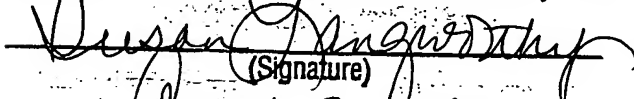
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